IN THE

Supreme Court of the United States

ROY JONES,

Petitioner in Certiorari

vs.

UNITED STATES OF AMERICA

Number 331

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

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CITATIONS

Cases:

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Now comes ROY JONES, petitioner in certiorari, and petitions this Honorable Court for the writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Petitioner was indicted on four counts for violating the Internal Revenue laws of the United States relating to liquor in the United States District Court for the Northern District of Georgia, Gainesville Division. Prior

to the trial of the case on its merits petitioner filed a written motion to suppress certain evidence on the ground that the evidence was obtained by federal officers from the dwelling house of petitioner at night without lawful warrant or authority and forcibly and against his will. This issue was tried before the Court, and upon the hearing evidence was introduced by petitioner that five officers raided the home and dwelling house of petitioner at night without a nighttime search warrant and found therein a distillery consisting in part of an upright boiler with a blower burner and 2,400 gallons of mash with hose pipes and a small quantity of non-tax paid liquor. Petitioner was not at home at the time of the raid, but his wife and 12 year old son refused to allow the officers access to the premises and the officers were forced to gain entrance over the utmost show of force upon the part of petitioner's family. Evidence was offered by petitioner, and the trial judge so found in his findings of fact, that five officers were present and there were only two or three doors to the dwelling "and it would have been possible for the officers to watch each of the doors and still send another officer for a nighttime search warrant had the officers deemed this to be necessary." (Rec. p. 99.) The Court found "that the facts and circumstances within the knowledge of the officers were sufficient in themselves to warrant a man of reasonable caution in the belief that an offense was being committed" and that "probable cause for the search existed at the time the search was made." (Rec. p. 100.)

The trial judge, in his conclusions of law on this issue, held that "If the officer has no warrant, he must show probable cause." (Rec. p. 100.) In so holding that a search warrant was no longer necessary if probable cause

for the search existed the trial judge relied upon the case of United States versus Rabinowitz, 339 U.S. 56. The motion to suppress was overruled and denied by the trial judge and the United States Court of Appeals for the Fifth Circuit, on the appeal from petitioner's conviction, affirmed this ruling and held that "the findings warranted, indeed required, the conclusions of law reached by the court and the overruling of the motion to suppress." A motion for rehearing was filed by petitioner, and denied by the United States Court of Appeals.

JURISDICTION

(a) The judgment of the Court of Appeals was entered on June 10, 1957. A petition for rehearing was denied July 3, 1957. The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. 1254 (1), and under and by virtue of 18 U.S.C. 3772 and within the time prescribed in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934 (292 U.S. 661, 666, 54 S. Ct. XXXIX).

(b) The constitutional provision of the Constitution of the United States, the construction of which is involved in this application for certiorari, is as follows:

Amendment Four, United States Constitution.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(c) The statute of the United States, the validity of

which is involved in this application for certiorari, is as follows:

"Rule 41, (c) Federal Rules of Criminal Procedure." providing in part: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time."

(d) This petition for certiorari is being filed in this Court within 30 days from the date of the judgment denying the motion or petition for rehearing.

(e) The nature of the case and the rulings of the Court were such as to bring the case within the jurisdictional provisions relied upon, and the grounds upon which it is contended that the questions involved are substantial are as follows:—

(1) The United States Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court.

(2) The United States Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

(3) The United States Court of Appeals for the Fifth Circuit has misconstrued a decision of this Court involving the construction of a constitutional amendment, and has, by its ruling, eliminated the necessity of a search warrant in order to search a dwelling house at night.

(4) The United States Court of Appeals for the Fifth

Circuit has decided a question of gravity and importance involving federal criminal procedure as it relates to searches and seizures without warrant based upon mere probable cause.

THE QUESTIONS PRESENTED

1. Whether a search of a person's dwelling house at night, and the seizure of articles therefrom by federal officers, is justified without a search warrant issuing from a magistrate when it is practicable to secure a search warrant and no justification or excuse is offered by the Government except some slight delay incident to preparing the necessary papers.

2. Whether the decision by this Court in the case of United States versus Rabinowitz, 339 U.S. 56 stating that: "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable," eliminates the necessity of a search warrant in all cases where probable cause for the search exists, or whether the decision in that case is applicable only in cases where the search is made incidental to a lawful arrest.

3. Whether federal officers acting on probable cause, and without a search warrant, are authorized to conduct a search of a dwelling house at night where there exists no pressing emergency or other reasons justifying their action, and under such circumstances that a United States Commissioner, acting under and by virtue of Rule 41 (c) of the Federal Rules of Criminal Procedure, would be required to have positive affidavits before authorizing such a search.

4. Whether the practicability of procuring a search

warrant is no longer an element in determining the reasonableness of a search without a warrant.

5. Whether a search without a warrant is reasonable, within the meaning of the Fourth Amendment, because the federal officer has probable cause to search, or whether the "probable cause" provision of the Fourth Amendment is meant to prescribe the duty of the issuing magistrate.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. Due to the decision of the trial judge in this case, affirmed by the United States Court of Appeals for the Fifth Circuit, search warrants are no longer essential in any case as long as there exists probable cause for the search without a warrant.

2. Prior to the decision of this Court in the Rabinowitz case, supra, search warrants were necessary prerequisites to the validity of a search of a dwelling unless the Government could show some urgent or pressing emergency justifying the search to be made without a warrant, and probable cause was a necessary element to be sustained even in those cases where search warrants had been procured from magistrates.

3. The United States Court of Appeals for the Fifth Circuit, in affirming the decision of the trial judge in this case, completely ignored and overlooked the decisive decision of this Court in the case of Johnson v. United States, 333 U.S. 10, where this Court held the search of a person's hotel room to be unreasonable where there was no warrant in existence authorizing the search, and where sufficient time existed to procure one, even though prob-

able cause existed for the search. This Court held in that case that the probable cause should have been determined by a detached and impartial magistrate.

4. The United States Court of Appeals for the Fifth Circuit, in affirming the decision of the trial judge in this case holding the Rabinowitz case, supra, to be controlling on the questions involved, completely ignored and overlooked the more recent case from this Court of United States versus Jeffers, 342 U.S. 48, holding that: "Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes. * * * Only where incident to a valid arrest, * * * or in 'exceptional circumstances' * * * may an exemption lie, and then the burden is on those seeking the exemption to show the need for it. * * * "

APPENDIX

Petitioner herein appends to this petition a copy of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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JUDGMENT

Extract from the Minutes of June 10, 1957.

ROY JONES,

No. 16396. versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16396

ROY JONES,

Appellant,

VERSUS

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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(June 10, 1957.)

Before BORAH, RIVES and BROWN, Circuit Judges.

PER CURIAM: On a trial before the court without a jury, the appellant was convicted of knowingly having in possession an unregistered still in violation of Section 5601, Title 26, United States Code, making and fermenting mash in violation of Section 5216 of said Title, possessing 413 gallons of nontaxpaid distilled spirits in violation of Section 5008 of said Title, and of working in an unregistered distillery in violation of Section 5681 of said Title. The sole insistence on error goes to the overruling

by the district court of the appellant's motion to suppress. The findings of fact made by the court after hearing the evidence are not attacked. In our opinion, those findings warranted, indeed required, the conclusions of law reached by the court and the overruling of the motion to suppress. Since such findings and conclusions have not previously been published, they are attached as an Exhibit to this opinion. The judgment is

AFFIRMED.

EXHIBIT

"(TITLE OMITTED.)

"Roy Jones has filed a motion in this Court to direct that certain property, to-wit: One 6 horsepower boiler, electric fuel burner and about 15 barrels, be suppressed as evidence and ordered returned to him on the ground that on the premises of the residence of Roy Jones on No. 136 Highway in Dawsonville, Georgia, Route 3, said articles were unlawfully and illegally seized from said premises on May 2, 1956, by federal officer W. W. Langford and four others whose names are unknown.

"The matter came on for a hearing before the Court, evidence for both parties was heard; memoranda of authority submitted and after due consideration the Court makes the following:

"Findings of Fact.

"On April 30, 1956, the federal investigators of the Alcohol & Tobacco Tax Unit of the Internal Revenue Department received information that Roy Jones was operating an illicit distillery in his home in Dawson

County, Georgia. The Government refused to reveal the source of this information and the Court cannot determine that such source was reliable; however, the defendant, Roy Jones, had previously been found to be operating an illicit distillery in his home and the federal officers knew of this fact and they did credit the information and on that date made an investigation near the home of Roy Jones.

"In a hollow to the rear of Roy Jones' house, the officers found spent mash flowing down a branch and upon investigation discovered that it was running from a concealed rubber hose which, upon being traced, led in the direction of the defendant, Roy Jones' home, tracing said hose to within about 75 yards of his home. On the following day, the federal and state officers placed themselves across the public highway from Roy Jones' home concealing themselves in a woods to where they had plain view of the defendant, Roy Jones' house and while there they heard the noise of a blower burner, this blower burner being of the type generally used in Dawson County, Georgia, to heat illicit distilleries, no other use for such a blower burner being known in said county. The officers also smelled the odor of hot mash coming from the direction of the house and they kept the house under surveillance until after 2:00 o'clock in the morning of May 2 and during this time they heard much activity, the moving of heavy objects about, inside the house, with the blower burner operating as late as 2:00 o'clock A.M.

"During the watch over Roy Jones' house, the officers observed a motor vehicle go into the yard of the residence and during the stay of the vehicle the blower burner did

not run but after the vehicle left, the sound of the blower burner was again heard.

"Shortly after 2:00 A.M., on May 2, 1956, the officers left their post of observation and returned to Gainesville and during the day of May 2, 1956, federal officer Woody W. Langford went before United States Commissioner in Gainesville, Georgia, and obtained a daylight search warrant to search the dwelling and premises of the defendant, Roy Jones; Langford at that time making affidavit before the United States Commissioner which stated in substance what the officers had discovered and asserted the belief that there was an illicit distillery in the home of Roy Jones.

"Late in the afternoon the officers returned to their post of observation, near the home of Roy Jones, and desiring to seize any vehicles engaged in removing the illicit liquors they did not immediately execute the daylight search warrant but waited for some vehicle to arrive. Since no vehicle came to the dwelling until after dark, they did not execute the daylight search warrant but remained on watch until after dark and until about 9:00 o'clock P.M. About 9:00 P.M. some person left the residence of Roy Jones and went up the road toward the home of Frank Jones, the father of Roy Jones, and where Millard and Grady Jones, brothers of Roy Jones, lived and at that time the officers overheard a conversation when it was asked of some one in Roy Jones' house if they were ready for the truck to be brought to the house. A short time later, a truck left the yard of the home of Roy Jones' father nearby and drove into the yard of Roy Jones' house and around into the back where the officers heard a thumping sound as though there was activity with heavy objects and shortly thereafter the truck pulled

out from the rear of Roy Jones' house and started to drive into the highway but it was rainy and wet and as the truck tried to pull up the incline from the yard into the highway it became stuck and at that point the officers made the initial move to seize the truck and raid the home of Roy Jones. They arrested James McKinney and William Grady Jones, occupants of the truck, and seized 413 gallons of nontaxpaid liquor which was loaded on the truck. About that time a car drove up into the yard of Roy Jones' house and in the car was the wife of Roy Jones with his children, and Mrs. Lois Willis, the sister of Mrs. Roy Jones and her children. Mrs. Roy Jones undertook to block the doorway to keep the officers from entering the dwelling house, telling the officers to wait until her husband, Roy Jones, returned. A twelve year old son of Roy Jones obtained a shotgun and while he did not point it at the officers, he held it at port arms in what the officers considered a threatening manner and the first entry into the residence was made by State Agent Hollingsworth to secure the shotgun and take it away from the child. Mrs. Jones asked officer Woody Langford if he had a search warrant and Langford replied that he did not need one and the officers then searched the premises without a search warrant.

"The house had only two or three doors and there were five officers watching the residence and it would have been possible for the officers to watch each of the doors and still send another officer for a nighttime search warrant had the officers deemed this to be necessary.

"Upon a search of the premises, it was found that in a downstairs rooms of the house there was a complete distillery consisting in part of an upright boiler with a blower burner with which to heat it, and in the attic

there was 2400 gallons of mash with hose pipes leading to the outside for the disposition of the spent mash. There were no signs posted showing it to be a registered distillery. It was fully setup and ready for operation and had been recently operated. A small quantity of nontax-paid liquor was found in the residence also.

"The Court finds that the facts and circumstances within the knowledge of the officers were sufficient in themselves to warrant a man of reasonable caution in the belief that an offense was being committed and therefore the Court finds that probable cause for the search existed at the time the search was made.

Conclusions of Law.

"Only unreasonable searches are proscribed by the Fourth Amendment. There is no precise formula for determining reasonableness. Every case must turn on its own facts and circumstances.

"If the officer has no warrant, he must show probable cause.

"Probable cause is reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged. See Dumbra v. United States, 268 U.S. at page 441. The search here was not unreasonable and did not violate the Fourth Amendment because the officers had reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that Roy Jones was guilty of the offense of operating an illicit distillery in his home and this is true even though the officers had time to obtain a nighttime

search warrant. See United States v. Rabinowitz, 339 U.S. 56 at page 66, overruling Trupiano v. United States, 334 U.S. 699, to the extent that the Trupiano case required a search warrant solely upon the basis of practicability of procuring rather than upon the unreasonableness of the search, stating that: 'The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.'

"Judgment.

"The motion to suppress is overruled and denied.

"This the 11 day of October, 1956.

"BOYD SLOAN,
"United States District Judge.

"Filed Oct. 11, 1956."

A True Copy

Test: s/Edward W. Wadsworth
Clerk U. S. Court of Appeals, Fifth Circuit
New Orleans, La.

(Seal)

IN THE

Supreme Court of the United States

ROY JONES,

Petitioner

vs.

THE UNITED STATES OF AMERICA

BRIEF OF LAW ON BEHALF OF PETITIONER

ARGUMENT AND CITATION OF AUTHORITY

The single question before this Court is whether or not federal officers are justified in invading the privacy of a man's home at night, searching it forcibly and against his will and seizing therefrom evidence of crime, without lawful warrant or authority issuing from a magistrate or other judicial officer but upon probable or reasonable cause to suspect that a felony is being committed and where sufficient time exists to procure a search warrant.

From the findings of fact made by the trial judge it appears that the federal officers had the premises in question under surveillance for two or three days. During this constant surveillance they were able to ascertain and assert a belief under oath that there was an illicit distillery located in the home of Roy Jones. During the day of May 2nd one of the officers appeared before the U. S. Commissioner in Gainesville; and made affidavit stating on information and belief that there was an illicit distillery on the premises. Upon this affidavit, the Commissioner issued a daytime search warrant. The officers

did not execute this warrant during the daytime, although they had ample opportunity to do so. They waited until about 9:00 o'clock P.M. that night, after dark. At that time the officers attempted to gain entrance into the dwelling of Roy Jones who was not at home at that time. Mrs. Jones attempted to block the doorway requesting the officers to wait until her husband arrived. A twelve year old son of the appellant obtained a shotgun and held it in a threatening manner, in an attempt to keep the officers from searching the premises. Mrs. Jones asked the officer if he had a search warrant and he stated that he did not need one. They then searched the house and seized the contraband articles.

Here was a forcible search and seizure without warrant in a style and manner that would do justice to a police state in the hey-day of their reign. There was no doubt that the officers had probable cause for the procurement of the search warrant, because they did procure one that very day. Consequently all their probable cause for believing that a felony had been committed was merged in the search warrant. The officers placed their evidence before a judicial officer who thereupon rightfully empowered them with authority to search the premises *in the daytime*. Inasmuch as no person had sworn to *positive* facts in the affidavit, this was all the authority the United States Commissioner could impart. Rule 41, Federal Rules of Criminal Procedure. However, the officers did not carry out the mandate of the search warrant by searching the premises during the daytime. Instead, they waited until after it became dark, the period when the search warrant had slept. Then suddenly, without the cloak of protection of the search warrant, the officers struck like lawless men in the night. Here the raid on the

appellant's dwelling was proceeding by the officers of the government at a season of the night when not even the entire judicial power of the United States Government could have lawfully empowered them to search the premises on mere information or belief. Yet these officers, sworn to ferret out crime and arrest law violators, took into their own hands a much greater authority. Had these officers presented the facts they had in the form of an affidavit based on their belief before a United States Commissioner just immediately preceding their nighttime raid, a nighttime search warrant would have been refused, based on Rule 41.

The very able trial judge, in his findings of fact, recognized that there were only two or three doors to the house and there were five officers watching the residence, "and it would have been possible for the officers to watch each of the doors and still send another officer for a nighttime search warrant had the officers deemed this to be necessary."

While the trial judge recognized that under the facts of the case it would have been practicable for the officers to procure a nighttime search warrant, he did not believe this to be any longer an element necessary to sustain the validity of a search and seizure. The trial judge relied upon the case of United States versus Rabinowitz, 339 U. S., 56, at page 66, as authority for so holding. However, we respectfully take exception with the learned trial judge in this interpretation.

In the case of *Johnson v. United States*, 333 U. S. 10, (68 S. Ct. 367), where evidence of opium was suppressed because of entry into the room of defendant without a warrant, but based on probable cause, it was held:

"The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

"There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time will disappear.

"But they were not capable at any time of being reduced to possession for presentation to court. The evidence of their existence before the search was adequate and the testimony of the officers to that effect would not perish from the delay of getting a warrant.

"If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required."

Shortly thereafter, and at the same term of the Supreme Court, the question of the validity of a search and seizure without a warrant where sufficient time existed for the

procurement of a warrant came before the Court in the case of *Trupiano v. United States*, 334 U. S. 699, (68 S. Ct. 1229) and that Court again reiterated the principle that the search and seizure was illegal because the officers had sufficient time to secure a warrant from the magistrate before making the raid.

Two years later the United States Supreme Court had before it, in the case of *United States v. Rabinowitz*, 339 U. S. 56, (70 S. Ct. 430), the question of the validity of the search of a person's room *as an incident to a lawful arrest upon a valid warrant of arrest*. It was this latter decision that became the basis for the trial judges decision in the case at bar. It is true that in the Rabinowitz case, supra, the Supreme Court said: "To the extent that Trupiano v. United States, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search *after a lawful arrest*, that case is overruled." (Italics added). However, by a careful reading of the Rabinowitz case, supra, it is to be noted that in that case it appeared that Government agents there placed the defendant under arrest pursuant to a *valid arrest warrant*, and the only real issue decided by the Supreme Court was as to the lawfulness of the search *as incidental to the lawful arrest*. In other words the search of the room was held to be "reasonable" because it was *incidental to a lawful arrest*, and consequently, under the particular facts of that case, the practicability of procuring a search warrant was not actually involved.

To distinguish the Rabinowitz case, supra, from the other cases involving unlawful searches and seizures, the Court ruled:

"The arrest was therefore valid in any event, and

respondent's person could be lawfully searched." Again the Court ruled: "We think the District Court's conclusion that here the search and seizure were reasonable should be sustained because: (1) the search and seizure were incident to a valid arrest; * * * * * *"

Further on, in the same opinion, on the question of reasonableness, and to clarify the distinction between searches incident to lawful arrest and searches not incident to lawful arrest, the Supreme Court ruled:

"Lest the holding that such a search of an unoccupied building was unreasonable be thought to have broader significance the Court carefully stated in conclusion: 'This record does not make it necessary for us to discuss the rule in respect of searches in connection with an arrest'."

The Rabinowitz case, supra, insofar as it overrules the Trupiano case, supra, does so only to this extent:

"To the extent that Trupiano v. United States, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search *after a lawful arrest*, that case is overruled." (Italics added.)

The Rabinowitz case, supra, does not overrule the older cases of Johnson, supra, and Agnello, supra, and its holding is applicable *only* in searches and seizures made *incident to a lawful or valid arrest*. Since the Rabinowitz decision, this Court has again been confronted with the same situation, in the case of

UNITED STATES v. JEFFERS, 342 U.S. 48, and held:

"Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judi-

cial processes. See Weeks, v. United States, 1914, 232 U.S. 383, 34 S.Ct. 341; Agnello v. United States, 1925, 269 U.S. 20, 46 S.Ct. 4. Only where incident to a valid arrest, United States versus Rabinowitz, 1950, 339 U.S. 56, 70 S.Ct. 430, or in 'exceptional circumstances,' Johnson v. United States, 1948, 333 U.S. 10, 68 S.Ct. 367, may an exemption lie, and then the burden is on those seeking the exemption to show the need for it, McDonald v. United States, 1948, 335 U.S. 451, 456, 69 S.Ct. 191."

Here was the judicial interpretation by this Court of the Rabinowitz decision construing and interpreting its meaning, and giving it effect. However, the United States Court of Appeals for the Fifth Circuit refused to recognize its force and effect. Here the Court ruled that only on two occasions, viz: (1) incident to a valid arrest, and (2) in exceptional circumstances may "an exemption lie." The Government does not show in this case any exception or exemption, but the trial judge, in his order, merely upholds Rabinowitz as the *rule* instead of the *exception*.

The learned trial judge in this case at bar held that "If the officer has no warrant he must show probable cause." Such reasoning would lead to the inevitable conclusion that search warrants are no longer necessary in any case. First, a valid search warrant may only issue by a United States Commissioner when and if sufficient evidence of probable cause is made to appear before him. (RULE 41, Federal Rules of Criminal Procedure.) This necessarily means that probable cause is a necessary element before a magistrate may act, so an officer must have probable cause to procure a warrant. However, according to the trial judge's ruling in this case an officer

does not need a warrant so long as he has probable cause. The conclusion therefore inevitably follows that if these two premises be true a search warrant is no longer necessary. This can not be the law, because if it were it would bring about the complete and utter destruction of the need for an impartial magistrate to protect persons from unlawful searches and seizures by zealous law enforcement officers who would be empowered to act on their own discretion.

The Fifth Circuit Court of Appeals has construed the Rabinowitz case, supra, different from that of the trial judge in the case at bar, in the case of *Rent v. United States*, 209 Fed. 2nd, 893, as follows

> "The Government apparently takes the position that, since the decision in United States versus Rabinowitz, supra, the practicability of procuring a search warrant is not to be considered in deciding whether the search without a warrant was reasonable. We do not understand that the decision in that case went so far. * * * * * * *
>
> "The Court did not overrule the other cases referred to in the vigorous dissent of Mr. Justice Frankfurter and did not criticize the able opinion of Chief Justice Taft in Carroll v. United States, supra. Rather, the Court said that whether the search was reasonable 'depends upon the facts and circumstances—the total atmosphere of the case.'
>
> "We think that one of the facts and circumstances to be considered in this case is the fact that there was no reason for not submitting to a magistrate the evidence which the officer deemed sufficient to justify a search of the automobile. The need for effective law enforcement is not satisfied as against the right of privacy by any necessity for the officer to take

> the decision into his own hands. The officer had ample opportunity to apply for a search warrant and in our opinion a search of the automobile without a warrant was not justified."

Thus, here is a clear interpretation of the Rabinowitz case, supra, by the 5th Circuit Court of Appeals. The trial judge in the case at bar, in construing this case according to the standards of the Rabinowitz case, a case involving a search incident to a lawful arrest upon a valid warrant, has overlooked or misapplied all the other rulings by the Supreme Court that were not overruled therein, such as the Johnson case, supra, and many others.

In numerous cases prior to the Rabinowitz case, supra, the Supreme Court had consistently held that the practicability of procuring a search warrant was an element to be considered in determining the reasonableness of a search without a warrant. In the case of *Agnello v. United States*, 269 United States, 20, (46 S. Ct. 4,) it was held:

> "Save in certain cases as incident to arrest, there is no sanction in the decisions of the courts, federal or state, for the search of a private dwelling house without a warrant. *Absence of any judicial approval is persuasive authority that it is unlawful.* See Entick v. Carrington, 19 Howard's State Trials, 1030, 1066. Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. *And such searches are held unlawful notwithstanding facts unquestionably showing probable cause.*" (Italics added.)

In *United States v. Lefkowitz*, 285 U. S. 452, (52 S. Ct. 420,) it was held:

> "Indeed, the informed and deliberate determina-

tions of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."

In another very recent decision from the 5th Circuit this court again passed on and construed the Rabinowitz case, supra. In the case of *Clay v. United States,* 239 Fed. 2nd, 196, this court said:

> "Finally, while the ease and practicability of obtaining the warrant of arrest or to search, Trupiano v. United States, 334 U. S. 699, 68 S. Ct. 1229, is no longer an invariable rule of thumb, United States v. Rabinowitz, 339 U. S. 56, 70 S. Ct. 430, *availability of the safeguards afforded by an impartial, judicial magistrate is a factor bearing on reasonable, probable cause.*"

Finally, in conclusion, appellant calls to the attention of the Court one of the mandatory provisions of Rule 41 (c) of the Federal Rules of Criminal Procedure, providing for the issuance and contents of search warrants. After directing the manner of procedure, the rule then states:

> "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time."

A United States Commissioner's duty would be clear. If the officers of the government had appeared before him

with the information that was available to them just prior to the entrance into appellant's home, he would have been authorized to "direct that it be served in the daytime," inasmuch as no officer had *positive* information as to the existence of the still in the house. If, then, the Commissioner would have been without authority to lend judicial sanction to a nighttime search, can the authority of the arresting officer rise to greater heights than one maintaining judicial authority? To so hold in the affirmative would be to destroy and render useless the impotent Rule 41.

The search of the appellant's home at night, invasion of his family's privacy and seizure of the articles contained in his home was a clear violation of the Fourth mendment to the Constitution of the United States. The judgment of the U. S. Court of Appeals affirming the judgment overruling and denying the motion to suppress should be reversed.

Respectfully submitted,

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